wat, that the accused worked in Kota Bharu since 1981, that the accused had a drinking habit, that the accused was a labourer and had no means as he used to ask her for money as on the day in question, that the accused had a friend Hassan bin Dollah living in Golok, that the accused had told her he was returning via Golok and not Ta'bai as he was evading the Thai authorities and that he had left her house that morning without any luggage. But that was as far as her corroboration went.

The crux of the accused's defence came later. He said he had had this chance encounter with An La and his friends in a Chinese restaurant at around lunchtime. He had then decided not to go back alone as An La had told him to go back with the group later in the evening. At around 4 p.m. the group left him alone in the restaurant. He was not bothered with this as he was quite in an intoxicated state due to the Mei Kong liquor. An La then returned to the restaurant alone in a white Datsun and asked the accused to follow the motorcyclist he had brought along to the crossing point. The motorcyclist had then brought the accused to a waiting boat and boatman in which boat the accused saw a bag. He was directed to bring this bag across and wait for An La on the other side.

Now, is this the action of someone who was taking pains to avoid the authorities as he had no valid travel documents and was in fact a refugee? His sole intention would be to cross to the Malaysian side as quickly as possible without being detected. Yet he chose first to pay a visit to a friend living in the outskirts of Golok for a few hours. Then instead of lunching with that friend in the privacy of his house, he turned down his friend's invitation and had lunch alone in a Chinese restaurant.

When An La told him to go back with his group, he felt it was safer as he did not have any passport or permit. Then he proceeded to intoxicate himself with liquor. When the group left the restaurant, he should have been worried that they were leaving him but he explained he was not as he was under the influence of drink. When An La returned half an hour later he was still not concerned that he was not asked to go with An La in his empty white Datsun as earlier promised but to follow an unknown motorcyclist to a boat at the river. Would this be a reaction consistent with a person who had earlier felt it was safer to return to Malaysia in a group rather than alone? Then when the motorcyclist told him to bring the bag in the boat to An La's group on the Malaysian side, he did so without the slightest curiosity or concern as to what he was doing.

Having seen and heard the accused, the Court was of the considered view that his story in the light of the case for the prosecution was merely a fabrication calculated to pervert the course of justice and I held that his version of how he was in possession of P5 was purely a concoction inconsistent with his innocence. His evidence, in the Court's mind, had failed to rebut the presumptions raised by the prosecution on a balance of probabilities and I therefore found him guilty as charged and sentenced him to death.

Convicted and sentenced accordingly.

Solicitors: *Mahmood Adam, Wan Ismail & Co.*

PUBLIC PROSECUTOR v. MOHAMED ZAIRI BIN ABU BAKAR & ANOR.

[R.Cr. J. (Wan Yahya J.) November 4, 1985]

[Malacca – Criminal Revision Nos. 2 & 3 of 1985]

Juveniles – Escape from boys' home – Arrest – Order for temporary detention – Whether Magistrate sitting alone constitutes Juvenile Court – Registrar's Circular No. 10 of 1978 – Juvenile Courts Act 1947, ss. 3, 4 & 32.

The two accused, both juveniles, escaped from Rumah Budak Laki-Laki Tun Abdul Aziz, Melaka. They were arrested three days later and produced before the Magistrate. The learned Magistrate made orders for their temporary detention at the Asrama Bukit Baru and a month later he proceeded to hear the matter, sitting alone without the aid of advisers. He ordered the 1st accused to be committed to the Henry Gurney School and the other to Sekolah Tunas Bakti.

Held: (1) it is evident from the language employed in section 32 of the Juvenile Courts Act as well as the learned Registrar's circular that the juvenile apprehended for escaping from the approved school is to be taken before a Juvenile Court for an order to be made under section 32(1)(i), (ii) and (2). The constitution and functions of a Juvenile Court are spelt out in section 4 of the Act. The Magistrate sitting alone cannot constitute a Juvenile Court for the purposes of section 32;

(2) the committal orders made by the learned Magistrate were not made in accordance with the provisions of the Act and must therefore be quashed.

Observations on power to increase term of detention or to commit a juvenile to a rigid institution. Factors to be examined.

CRIMINAL REVISION.

Mohamed Raus bin Shariff (State Legal Adviser, Malacca) as *amicus curiae.*

Osman bin Ayub (Penguasa Rumah Budak Laki-Laki Tun Abdul Aziz, Durian Daun, Malacca) on behalf of both the juveniles.

Wan Yahya J.: On September 20, 1985 Mohamed Zairi bin Abu Bakar and Mokhzami bin Mokhtar, both juveniles, escaped from Rumah Budak Laki-Laki Tun Abdul Aziz, Melaka. They were arrested three days later and produced before the Magistrate, Melaka. The learned Magistrate made orders for their temporary detention at the Asrama Bukit Baru and a month later he proceeded to hear the matter, sitting alone without the aid of advisers.

The Juvenile Courts Act 1947 (revised 1972) stipulates two circumstances only when a magistrate sitting alone may try and impose punishment on juveniles. The first of such provisions is in respect of juveniles jointly charged with a person above 18 years of age (see section 3) and the second refers to petty offences (see section 3A). The powers to make an order under section 32 of the Act, therefore, does not fall within either of these two sections.

Presumably the learned Magistrate was purporting to act under the Registrar's circular No. 10/78 – paragraph 2 of which reads as follows:–

"It is clear that there is no question of the Juvenile who escape from any approved school being charged again in the Juvenile Court. This section does not say that the offender (juvenile) who escapes, *etc.* commits an offence, and therefore, a charge cannot be preferred against him. To charge him would necessitate the offender to be tried according to the provisions of section 10 of the Act. This would result in the Court which finds the offence proved, imposing on the offender any of the orders enumerated in section 12 of the Act. This is not what is contemplated by section 32 of the said Act."

This circular went on to specify in the next paragraph the step by step procedures to be adopted in dealing with section 32 in the following words:–

(a) A juvenile should be brought before the Juvenile Court where he is found or where the approved school is situated.

(b) The order issued by the Juvenile Court committing him to an approved school should be produced.

(c) The Court should then record the facts as related by the prosecuting officer pertaining to the juvenile's detention, his arrest, *etc.*

(d) If the juvenile admits the facts and the Court is satisfied with the facts, the Court shall make an order under section 32 of the Act.

(e) If, however, the juvenile does not admit the facts, the Court shall conduct an enquiry with the view to satisfying itself that the allegation is true and accordingly make any order it thinks fit.

It is evident from the language employed in section 32 of the Act as well as the learned Registrar's circular that the juvenile apprehended for escaping from the approved school is to be taken before a Juvenile Court for an order to be made under section 32(1)(i) and (ii) and section 32(2) of the Juvenile Courts Act 1947. The constitution and functions of a Juvenile Court are spelt out in section 4 of the Act. The magistrate sitting alone cannot constitute a Juvenile Court for the purposes of section 32.

The reason behind this is not too difficult to comprehend. The decision to increase the juvenile's period of detention, to transfer him to another home or to confine him to a more rigid and rigorous detention involves serious consideration which any magistrate, especially a young one, might find it difficult to make without the assistance of advisers.

I do not think that the Registrar's circular was intended to, and indeed cannot, override the provisions of the statute and therefore the term 'Juvenile Court' must mean the Court as constituted under section 4 of the Act. The orders made by the learned magistrate committing Mohamed Zairi bin Abu Bakar to the Henry Gurney School, Melaka and in respect of Mokhzami bin Mokhtar to Sekolah Tunas Bakti, Taiping, Perak were not made in accordance with the provisions of the Juvenile Courts Act.

In exercise of my revisionary powers I quash both the orders and direct both these boys to be taken before a properly constituted Juvenile Court to be dealt with in accordance with the law.

By way of observation I wish to reiterate that the power to increase the term of detention or

to commit a juvenile to a rigid institution like the Henry Gurney School must be carefully exercised. The urge to escape from custody to return home is an irresistibly natural rather than a culpable act of all freedom loving people of which our young children form no exception. Many factors have to be examined such as a juvenile's family background, his attachment to his members of his family, any extenuating circumstances that might provoke his desire to escape, his compatibility with his present school in particular his relationship with the staff of the school, and *vice versa*, the frequency of his escapades, the previous offences for which he has been committed to this school and any other special reason that he may offer must be taken into consideration. In this regard it would be a great interest to the Court if a juvenile could be persuaded to state in confidence to the Court the causes rather than the admission for his escaping from custody.

A Juvenile Court should always bear in mind that the committal order to the Henry Gurney School is a very last resort to be adopted in matters of this nature. Sending a juvenile to a place of detention which is not merely more rigorous but which unfortunately also exposes the child to the company of indurated and mature offenders may not be in the best interest of the juvenile.

I do not think it is fair for us to assume that a drop-out from one approved school cannot be turned into a worthy inmate in another similar institution. Wherever possible a juvenile should be given an opportunity to have a second chance at another place before condemning him to a more rigid place of reformation. When a juvenile exhibits persistent tendencies to escape, it would be desirable for the authorities concerned to take an early step to get him transferred to another school before he attains the age of 14. Even after the attainment of that age, there is nothing to prevent the authorities from transferring him from one school to another by invoking the provision of section 41 of the Juvenile Courts Act. If in spite of his second chance in another school the juvenile persists with his escapades, then obviously committal to Henry Gurney School is the proper remedy.

The two juveniles herein shall be remanded in custody in Rumah Budak Laki-Laki Tun Abdul Aziz, Melaka and be produced in the Juvenile Court in Melaka at its next sitting.

Order accordingly.

KASTURI PALM PRODUCTS v. PALMEX INDUSTRIES SDN. BHD.

[O.C.J. (Mohamed Dzaiddin J.) November 4 & December 2, 1985]

[Penang – Originating Summons No. 151 of 1981]

Arbitration – Award made in London – Plaintiff firm resident in India – Leave to enforce award – Whether Malaysian law complied with – Arbitration Act, 1952, s.4.

Practice and Procedure – Foreign plaintiff – Security for costs – Discretion of Court – R.H.C. 1980, O.23 r.1(i), O.67 & O.69 r.6.

The plaintiff firm carries on business in Bangalore, India. Its managing partner, an Indian national, also resides there. The plaintiff seeks to enforce the award of Arbitration No. 1917 dated January 28, 1980 adjudicated by the Arbitrators in London. The defendants are contesting the legality of the Arbitration award and are applying for an order requiring the plaintiff to furnish security for costs before the main application is heard. The question is whether it is just to order security for costs.

Held: (1) under Order 23 rule 1(i), security for costs cannot now be ordered as of right from a foreign plaintiff but only if the Court thinks it just to order depending on the circumstances of the case;

(2) the inference here is that the plaintiff may not have complied with Order 69 rule 6 of the Rules of the High Court, 1980;

(3) in the exercise of his discretion, the learned Judge ordered the plaintiff to deposit $10,000 in Court as security for costs before the next hearing date.

Cases referred to:

(1) *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.* [1973] 2 All E.R. 273.

(2) *Aeronave SPA & Anor.* v. *Westland Charters Ltd. & Ors.* [1971] 3 All E.R. 531.

ORIGINATING SUMMONS

S.P. Annamalai for the plaintiffs.

Ghazi Ishak for the defendants.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: The plaintiff is a firm carrying on business at No. 368, 14th Cross, Upper Palace Orchards, Bangalore, India. The managing partner is an Indian national also residing in Bangalore. The plaintiff has filed an application for leave of this Court pursuant to section 27 of the Arbitration Act 1952 to enforce the award of Arbitration No. 1917 dated January 28, 1980 which was adjudicated by the Arbitrators in London pursuant to the Rules of Arbitration and Appeal of Federation of Oils, Seeds, Fats, Association (FOSFA), 24 St. Mary Axe, London EC3A 8ER.